Supreme Court, U.S.
FILED
FEB 7 2003
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(3)

No. 02-862

In the Supreme Court of the United States

BOISE CASCADE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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20 pp

QUESTION PRESENTED

Whether a district court injunction that required petitioner to obtain a permit before harvesting timber on its property constituted a taking under the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App. sa1-sa30) is reported at 296 F.3d 1339. The opinion of the Court of Federal Claims (Pet. App. 2a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2002. A petition for rehearing was denied on September 3, 2002 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish or wildlife determined to be endangered or threatened. Administration of the ESA is divided between the Secretaries of the Interior (through the Fish and Wildlife Service (FWS)) and of Commerce (through the National Marine Fisheries Service), depending upon the species involved. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b).

The ESA authorizes the appropriate Secretary to list a domestic or foreign species as endangered or threatened. 16 U.S.C. 1533(a).[1] Section 9(a)(1)(B) of the Act, 16 U.S.C. 1538(a)(1)(B), provides that it is generally unlawful to "take" any endangered species within the United States. The ESA defines the term "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). The term "harm" is defined by Interior Department regulations to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. 17.3; see 50 C.F.R. 222.102 (Commerce Department definition of "harm"); *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995) (upholding Interior Department regulation defining "harm" for purposes of "take" prohibition). For species under her

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[1] An endangered species is one that is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. 1532(6). A threatened species is one that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. 1532(20).

jurisdiction, the Secretary of the Interior has generally extended Section 9's take prohibition to cover threatened as well as endangered species. 50 C.F.R. 17.31(a). The ESA establishes both civil and criminal penalties for violations of Section 9 and implementing regulations. 16 U.S.C. 1540.

Under Section 10(a)(1)(B) of the ESA, the Secretary may permit the "take" of a listed species "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B). The applicant for an Incidental Take Permit (ITP) under Section 10 must submit a conservation plan describing the impact of the take, steps the applicant will take to minimize and mitigate those impacts, and alternatives the applicant has considered. 16 U.S.C. 1539(a)(2)(A); 50 C.F.R. 17.22(b)(1), 222.307(b)(5). Upon receipt of a complete application, the Secretary publishes notice of the application in the *Federal Register*. 50 C.F.R. 17.22, 222.303(b). The Secretary may issue an ITP if she finds that the taking will be incidental and "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild," and that the applicant will minimize and mitigate the impacts on the species "to the maximum extent practicable" and will implement any other terms and conditions the Secretary deems necessary and appropriate. 16 U.S.C. 1539(a)(2)(B); 50 C.F.R. 17.22(b)(2), 222.307(c)(2). The take of any listed species in compliance with the terms of an ITP does not violate Section 9 of the ESA. See 16 U.S.C. 1538(a)(1).

2. Petitioner Boise Cascade Corporation owns a tract of timberland of approximately 65 acres, known as the Walker Creek Unit, located in Clatsop County,

Oregon. Pet. 5; C.A. App. 14.[2] A pair of northern spotted owls, a federally listed threatened species, nested on the site from 1990 to 1996. C.A. App. 14. In order to protect the spotted owl nesting site, the Oregon Department of Forestry prohibited logging in an area that included the Walker Creek Unit. *Ibid.*

In October 1997, the State of Oregon notified petitioner that because the owls had not occupied the nesting site during the 1997 nesting season—the female owl had died and the male owl had moved to a nesting site outside the Walker Creek Unit—the State considered the owls to have abandoned the site. C.A. App. 14, 196. Petitioner then submitted a plan to harvest the timber on the Walker Creek Unit. *Id.* at 14-15. The State approved the plan but advised petitioner that it should consult with the FWS before it commenced logging operations. *Id.* at 15.

After inspecting the site, the FWS informed petitioner that the Walker Creek Unit "contain[ed] nesting habitat as well as foraging or dispersal habitat for spotted owls" and that logging would "create a risk of harm to the northern spotted owls which would use this site." C.A. App. 15, 211. The FWS suggested that if petitioner "desire[d] certainty in this matter," it could file an application for an ITP or pursue a land exchange with the State. *Id.* at 211. Instead of applying for an ITP, petitioner filed suit against the FWS in federal district court, seeking a declaration that logging on the Walker Creek Unit would not "take" spotted owls within the meaning of the ESA, and an injunction prohibiting the FWS from taking any action to prevent the

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[2] Petitioner's complaint identified "50 acres of merchantable timber," C.A. App. 14, but apparently the tract is somewhat larger. See Pet. 5; Pet. Supp. App. sa1.

logging. Pet. App. 19a-24a. The United States filed a counterclaim to enjoin petitioner from logging on the Walker Creek Unit without an ITP. C.A. App. 15.

On April 1, 1998, the district court dismissed petitioner's complaint and preliminarily enjoined it from logging during the pendency of the litigation. C.A. App. 102-119. The court explained that, under the applicable regulations, "significant habitat modification—such as [petitioner's] proposed logging—can constitute a taking of an endangered or threatened species even if no members of that species are immediately present." *Id.* at 116. The court found that preliminary injunctive relief was appropriate "[b]ecause [petitioner's] own witnesses have testified to facts that indicate that irreparable harm is imminent and that a taking of spotted owls in violation of the ESA is likely to occur." *Id.* at 118. The court permitted the FWS to survey the Walker Creek Unit for spotted owls, and it required the parties to report to the court by September 4, 1998, on the results of the surveys, as well as on the parties' positions regarding whether logging would violate the ESA and whether petitioner could obtain an ITP. *Id.* at 16, 105, 118-119. Petitioner did not appeal.[3]

During the 1998 nesting season, a subadult spotted owl was found to have been in the area of the Walker Creek Unit. C.A. App. 134. On October 15, 1998, the

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[3] On June 28, 1998, petitioner filed suit in the Court of Federal Claims (CFC), alleging a Fifth Amendment permanent taking of the Walker Creek Unit resulting from the district court's injunction. See C.A. App. 134. The United States argued that the takings claim was not ripe because petitioner had not sought a permit from the FWS. *Ibid.* On November 13, 1998, the CFC entered a voluntary dismissal of petitioner's complaint without prejudice in order to facilitate petitioner's pursuit of available administrative remedies. *Ibid.*

district court permanently enjoined petitioner from "taking any northern spotted owls by the logging of any further timber in its Walker Creek Unit without a permit issued pursuant to Section 10 of the ESA." Pet. App. 36a. Petitioner again did not appeal.

On November 6, 1998, petitioner submitted an application for an ITP under Section 10 of the ESA. C.A. App. 16, 134. On December 10, 1998, while the FWS was evaluating the completeness of the ITP application, petitioner filed a mandamus action to require the FWS to publish notice of the application in the *Federal Register*. *Id.* at 132-135. On December 23, 1998, the FWS published notice of that application. *Id.* at 16. On February 5, 1999, the district court ordered the FWS to act on petitioner's permit application by September 1, 1999. *Id.* at 16-17, 157.

By letters dated July 30, 1999, the FWS notified petitioner that it no longer needed an ITP to conduct logging on the Walker Creek Unit tract. C.A. App. 159, 212. The subadult spotted owl that had previously been detected in the vicinity of the Walker Creek Unit was found dead on May 17, 1999, and subsequent surveys detected no spotted owls. *Id.* at 212. Accordingly, the FWS concluded that "no spotted owls would be taken by [petitioner's] planned harvest of the property" and that a permit was therefore no longer required. *Id.* at 159, 212. On August 17, 1999, the district court dissolved the injunction that it had previously entered against logging without a permit on the Walker Creek unit. *Id.* at 17.

3. On October 6, 1999, petitioner filed the instant suit in the Court of Federal Claims (CFC), seeking "just compensation for the temporary taking of merchantable timber, which it was prevented from logging as the result of an injunction obtained by the govern-

ment." C.A. App. 13. Petitioner's complaint set forth four claims. First, the complaint alleged that the district court injunction had imposed a temporary servitude upon petitioner's property by "requiring [petitioner's] merchantable timber to be left standing so it could be occupied as a northern spotted owl nesting site," and by "requir[ing] [petitioner] to allow government personnel to come onto [petitioner's] property for the purpose of determining if northern spotted owls were present." *Id.* at 17. Petitioner alleged that the injunction thereby effected a per se taking under this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and it sought just compensation in the amount of $295,012. C.A. App. 17. Second, the complaint alleged that by temporarily depriving petitioner of all economically productive use of its timber, the injunction constituted a per se taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). C.A. App. 17-18. Third, the complaint alleged that "[p]rotecting habitat where there are no identifiable owls present to be harmed and where that habitat has not been designated critical to the survival of the species, does not advance a legitimate governmental interest under the ESA," and that the injunction therefore constituted a taking under *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). C.A. App. 19. Fourth, the complaint alleged that petitioner had a reasonable investment-backed expectation that it would be able to harvest the timber on the Walker Creek Unit and that, by prohibiting logging, the injunction worked a temporary taking under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). C.A. App. 20.

The CFC granted the government's motion to dismiss the complaint. Pet. App. 2a-11a. The court in-

voked the "settled principle in takings law that a regulatory process that requires a property owner to obtain a permit before proceeding with a particular use of his or her property does not, in itself, effect a taking of the property." *Id.* at 8a. Rather, the court explained, "[o]nly when a permit is denied and the effect of the denial is to prevent economically viable use of the land in question can it be said that a taking has occurred." *Ibid.* (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) (internal quotation marks omitted)). The court concluded that "the permit process was an obligatory component of the Endangered Species Act on which no claim of taking may be based. A permit process that only temporarily curtails the use of private property cannot fairly be characterized as the appropriation of private property to public use." *Id.* at 10a-11a. The CFC also rejected petitioner's contention that the district court injunction had effected a "physical taking" by requiring petitioner to admit government personnel to the land and by forbidding petitioner to oust the northern spotted owl. *Id.* at 11a. The court explained that those "incidents of the permitting process * * * were transitory in character, involved no continuous governmental presence at the site and imposed no additional burdens on the property beyond the temporary curtailment of logging inherent in the permitting process itself." *Ibid.*

4. The court of appeals affirmed. Pet. Supp. App. sa1-sa30.

a. The court of appeals held that petitioner's regulatory takings claims lacked merit because the effect of the district court's injunction was simply that no logging on the Walker Creek Unit tract could take place without a permit. Pet. Supp. App. sa9-sa21. The court explained that, under the precedents of this Court and

the Federal Circuit, "the imposition of such a requirement, without more, simply cannot give rise to a compensable taking." *Id.* at sa16. The court relied on the "longstanding rule" that, unless and until a permit application is actually denied, "only extraordinary delays in the permitting process ripen into a compensable taking." *Id.* at sa20. Because petitioner had made "no claim of delay in the permitting process," the court of appeals "affirm[ed] the [CFC's] dismissal of the regulatory takings claims." *Id.* at sa21.

b. Petitioner also contended that "the district court's injunction worked a per se taking under [this] Court's decision in *Loretto* because (1) [petitioner] was prevented from excluding spotted owls from its property; and (2) [petitioner] was required to allow government agents to enter its property to conduct owl surveys." Pet. Supp. App. sa21. The court of appeals rejected that claim. *Id.* at sa21-sa29. The court observed that "[t]he holding of *Loretto* is quite narrow" and "applies only to permanent physical occupations either by the government or by a third party acting under government authority." *Id.* at sa22.

With respect to "the alleged taking of an 'owl easement' across [petitioner's] property," the court stated that the district court injunction did not deprive petitioner of any pre-existing right to exclude the birds because "[t]he ESA itself precludes [petitioner] from harassing, harming, pursuing, wounding, or killing spotted owls. [Petitioner] lost whatever right it had to 'exclude' the owls nesting on its land when they were listed as a threatened species under the ESA." Pet. Supp. App. sa23 (citations omitted). The court also observed that the temporary ban on logging could not properly be characterized as a "forced government intrusion" upon petitioner's land because "[t]he govern-

ment has no control over where the spotted owls nest, and it did not force the owls to occupy [petitioner's] land. The government simply imposed a temporary restriction on [petitioner's] exploitation of certain natural resources located on its land unless [petitioner] obtained a permit." *Id.* at sa25.

The court of appeals similarly rejected petitioner's claim of "a per se taking based on the requirement that it allow government officials to enter its land to conduct owl surveys." Pet. Supp. App. sa25. The court observed that "[t]ransient, nonexclusive entries by the [FWS] to conduct owl surveys do not permanently usurp [petitioner's] exclusive right to possess, use, and dispose of its property." *Id.* at sa26. It concluded that "the extremely limited and transient nature of the intrusion in this case, coupled with its purpose, which was to discover information necessary to the adjudication of a case that [petitioner] itself initiated, preclude a finding that a taking occurred as a matter of law." *Id.* at sa29.

ARGUMENT

Petitioner contends that it suffered a physical occupation of its property, and thus a per se taking under this Court's decision in *Loretto*, on the theory that "the FWS both claimed the right to use Petitioner's property for a spotted owl nesting habitat, and prevented Petitioner from engaging in any action to exclude the owls from its property." Pet. 11. Petitioner also suggests (see Pet. 10, 19, 22) that the district court effected a physical taking by authorizing FWS personnel to

enter the Walker Creek Unit.[4] Petitioner's claims lack merit and do not warrant this Court's review.

As the court of appeals recognized, "[t]he holding of *Loretto* is quite narrow. It applies only to permanent physical occupations either by the government or by a third party acting under government authority." Pet. Supp. App. sa22. The timber harvesting restrictions of which petitioner complains were temporary rather than permanent, and they did not effect a "physical occupation" of petitioner's land. Nor do this Court's decisions suggest that every entry of government officials onto private property constitutes a per se physical taking.[5]

1. A requirement that real property be left undisturbed until the issuance of a government permit is a common feature of land-use regulation. In *Riverside Bayview*, this Court considered and rejected the suggestion that such requirements effect a Fifth Amendment taking. The Court explained:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent

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[4] Petitioner does not press in this Court its prior claim, rejected by the court of appeals (see Pet. Supp. App. sa9-sa21), that the district court injunction effected a regulatory taking of its property.

[5] On January 13, 2003, this Court denied the petition for a writ of certiorari in *Seiber* v. *Oregon*, No. 02-348, which presented a substantially similar question.

> "economically viable" use of the land in question can it be said that a taking has occurred.

474 U.S. at 127. In *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1485 (2002), this Court reaffirmed that the normal delays associated with land-use permitting processes should not be treated as per se takings.

In the present case, neither the ESA itself nor the district court injunction foreclosed the possibility that timber could be harvested on petitioner's land. The Act makes clear that land-use activities may proceed, even when their incidental effect is to "take" members of an endangered species, so long as the landowner has obtained an ITP. The district court required the FWS to rule on petitioner's ITP application by a date certain, and the FWS determined before that date that an ITP was unnecessary, leaving petitioner free to harvest the timber on its land. That determination was made less than nine months after petitioner submitted its ITP application. Petitioner has made "no claim of delay in the permitting process," Pet. Supp. App. sa21, nor has it attempted in this Court to demonstrate a taking under the multi-factor analysis of *Penn Central*. This Court's decisions in *Riverside Bayview* and *Tahoe-Sierra* therefore foreclose petitioner's takings claim.

2. In *Loretto*, this Court held that a "permanent physical occupation" of real property constitutes a per se Fifth Amendment taking. 458 U.S. at 426-435. The Court applied that rule to a state-law requirement that the owner of an apartment building permit the installation of cable television equipment on the building's roof. *Id.* at 438-440. The Court has also held that a "permanent physical occupation" of real property occurs when members of the public "are given a permanent and con-

tinuous right to pass to and fro, so that the real property may continuously be traversed." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 832 (1987).

Nothing in this Court's decisions suggests that a prohibition on timber harvesting should be regarded for takings purposes as a "physical occupation," either by the trees themselves or by the wildlife whose habitat is protected. As the court of appeals explained, "[t]he government has no control over where the spotted owls nest, and it did not force the owls to occupy [petitioner's] land. The government simply imposed a temporary restriction on [petitioner's] exploitation of certain natural resources located on its land unless [petitioner] obtained a permit." Pet. Supp. App. sa25. Petitioner's theory would obliterate the distinction, central to this Court's Just Compensation Clause jurisprudence, between physical and regulatory takings. Under petitioner's theory, restrictions on a broad range of ground-disturbing activities (*e.g.*, logging, mining, filling of wetlands) could be recharacterized as "physical occupations" of the land by its existing physical features.

Land-use restrictions that deprive a parcel of all economic value may effect a taking under this Court's decision in *Lucas*. And even where the economic consequences of land-use regulation are less severe, the property owner may be able to establish a taking under the multi-factor analysis described in *Penn Central*. The government does not cause a per se taking under *Loretto*, however, simply by prohibiting the destruction or alteration of some pre-existing physical feature of the land.

3. Petitioner contends (Pet. 20) that "[t]here is a split among the lower courts in cases involving wildlife over whether a property owner can sustain a claim

based on a physical taking theory." Contrary to petitioner's suggestion, the cases upon which petitioner relies do not conflict with the court of appeals' decision.

In *Southview Associates, Ltd.* v. *Bongartz*, 980 F.2d 84 (1992), cert. denied, 507 U.S. 987 (1993), the Second Circuit rejected a claim similar to the one petitioner advances here. The plaintiff there claimed that the denial of a permit to construct a residential subdivision based on harm to necessary deer habitat constituted a per se taking under *Loretto*. *Id.* at 92-93. The court of appeals provided a detailed analysis of that claim and ultimately concluded that the permit denial "represent[ed] a regulation of the use of Southview's property, rather than a *per se* physical taking." *Id.* at 95. That holding is fully consistent with the court of appeals' decision in this case.

Bailey v. *Holland*, 126 F.2d 317 (4th Cir. 1942), did not involve a physical taking claim at all. The plaintiff there sued to enjoin enforcement of a regulation prohibiting hunting of migratory water fowl on lands adjacent to a federally owned refuge. *Id.* at 319. The plaintiff contended, *inter alia*, that the hunting ban constituted a regulatory taking. *Id.* at 324. The Fourth Circuit rejected that claim. *Ibid.*

Wisconsin v. *Herwig*, 117 N.W.2d 335 (Wis. 1962), involved a criminal prosecution for violation of a rule prohibiting hunting in an area of privately owned land. The defendant had a valid hunting license, but was nonetheless charged with hunting on his own land because it was designated a closed area. The court affirmed the defendant's acquittal, finding that the hunting ban worked a regulatory taking of his property under the state constitution. *Id.* at 340. The court did not discuss the proper treatment of per se physical invasions under the Fifth Amendment, and the case did

not involve temporary restrictions on particular uses of property during permitting procedures.

In *Shellnut* v. *Arkansas State Game & Fish Commission*, 258 S.W.2d 570 (Ark. 1953), the Supreme Court of Arkansas struck down a state regulation that prohibited hunting on lands surrounded by state wildlife refuges. The plaintiffs brought suit to enjoin enforcement of the regulation on the ground that it materially reduced the value of their lands by precluding them from preventing damage to their crops caused by deer. *Id.* at 573. Like the Wisconsin Supreme Court's decision in *Herwig*, the Arkansas Supreme Court's decision was based on the state rather than the federal constitution, see *id.* at 573-574, and it predates this Court's modern takings jurisprudence. Nor did that case involve temporary land-use restrictions imposed during the pendency of a permit application process. Petitioner has therefore identified no conflict in authority warranting this Court's review.

4. Petitioner suggests in passing (see Pet. 10, 19, 22) that the district court injunction effected a per se physical taking by authorizing FWS officials to enter and inspect petitioner's tract. That claim lacks merit. Although a per se taking may occur when members of the public "are given a *permanent and continuous* right to pass to and fro" along private property, *Nollan*, 483 U.S. at 832 (emphasis added), this Court has not suggested that the government must pay compensation whenever its officials enter privately owned land to monitor compliance with applicable legal requirements. To the contrary, the Court in *Loretto* emphasized the constitutional distinction between "cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, * * * on the other." 458 U.S. at 428; see *id.* at 428-435; cf. *New*

York v. *Burger*, 482 U.S. 691, 699-701 (1987) (discussing circumstances under which warrantless searches of commercial property will be deemed reasonable under the Fourth Amendment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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